No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

The two-judge majority below held that Virginia Congressional District 3, which perpetuates a district created as a *Shaw v. Reno* remedy, now violates *Shaw*. The majority, however, never identified any conflict between the Legislature's preeminent race-neutral traditional criteria and its purported racial considerations, never found that "race *rather than* politics" predominates in District 3, and never required Plaintiffs to prove "at the least" that the Legislature could have "achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan. *Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (emphasis original). The majority therefore found a *Shaw* violation even though Plaintiffs never proved that race had "a *direct and significant impact* on the drawing" of District 3 that "*significantly affect[ed]*" and "*change[d]*" its boundaries and, thus, failed to carry their heavy burden to show "that the legislature subordinated traditional race-neutral districting principles" to "racial considerations." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270-71 (2015) (emphasis added).

Instead, the majority held that race predominated because the legislative sponsor of the Enacted Plan correctly noted that Section 5 of the Voting Rights Act prohibited "retrogression [of] minority influence" in District 3, and that this federal-law mandate was "paramount" over "permissive" state-law traditional districting principles. Jurisdictional Statement Appendix 2a. Judge Payne dissented because the

majority failed to show that Plaintiffs had carried their "demanding burden" to prove that race predominated in the drawing of District 3. *Id.* 47a.

The questions presented are:

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the Legislature's political goals, is comparably consistent with traditional districting principles, and brings about greater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a *Shaw* violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance?

5. Do Appellants have standing to appeal where it is undisputed that any judicial remedy will change at least one district represented by an Appellant and harm that Appellant's re-election chances and interests as a Republican voter?

PARTIES

The following were parties in the Court below:

Plaintiffs:

Dawn Curry Page (dismissed via stipulation Apr. 9, 2014)

Gloria Personhuballah

James Farkas

Defendants:

Virginia State Board Of Elections (dismissed via stipulation Nov. 21, 2013)

Kenneth T. Cuccinelli, II, Attorney General of Virginia (dismissed via stipulation Nov. 21, 2013)

Charlie Judd, Chairman of the Virginia State Board of Elections

Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections

Don Palmer, Secretary of the Virginia State Board of Elections

Intervenor-Defendants:

Cu rent and former Virginia Congressmen Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf.

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BRIEF FOR APPELLANTS

Appellants Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf respectfully request that the Court reverse the three-judge court's opinion and order holding that Virginia Congressional District 3 violates *Shaw v. Reno*.

OPINIONS BELOW

The opinion of the three-judge court of the Eastern District of Virginia is reported at 2015 WL 3604029 (E.D. Va. June 5, 2015) and is reprinted at Jurisdictional Statement Appendix A ("J.S. App."). The court's order is unreported and is reprinted at J.S. App. B.

JURISDICTION

This Court vacated and remanded the three-judge court's first judgment in this case. *Cantor v. Personhubballah*, No. 14-518 (Mar. 30, 2015). The three-judge court's opinion and order on remand issued on June 5, 2015. J.S. App. A-B. Appellants filed their notice of appeal on June 18, 2015. J.S. App. E. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Voting Rights Act ("VRA"), which are reproduced at J.S. App. C-D.

STATEMENT

A. District 3: A *Shaw* Remedy

District 3 was created as Virginia's only majority-black congressional district in 1991. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997). In 1997, a three-judge court invalidated that district under *Shaw* and ordered the Legislature to enact "a new redistricting plan" that "conforms to all requirements of law, including the Constitution." *Id.* at 1151.

The Legislature adopted a remedial plan with 50.47% black voting-age population ("BVAP") in District 3. Joint Appendix 580 ("JA"). This 1998 version of District 3 began with portions of Richmond and Henrico County on the northwest end; connected through New Kent, Charles City, Prince George, Surry, and Isle of Wight counties; and used water contiguity to cross the James River and include portions of Newport News, Hampton, and Norfolk. JA 444. The 1998 version was not alleged to violate the remedial order and was used for the 1998 and 2000 elections.

The Legislature enacted a new plan (the "Benchmark Plan") in 2001. Benchmark District 3 retained the Richmond-Norfolk configuration and substantially the same shape as the 1998 version. *See* JA 443, 444. The Benchmark Plan increased District 3's BVAP to 53.1%. JA 140.

The Benchmark Plan was not challenged under *Shaw*, even though Virginia voters mounted *Shaw* challenges to the 2001 House of Delegates and Senate plans. *Wilkins v. West*, 264 Va. 447 (2002).

Benchmark District 3 was surrounded by four districts—Districts 1, 2, 4, and 7—which elected Republicans in 2010. That year, first-time Republican Congressman Appellant Scott Rigell beat a Democratic incumbent in District 2, an evenly divided district politically. JA 640-41, 760-61.

B. The Enacted Plan

In 2011, the Democratically-controlled Virginia Senate approved criteria for the new congressional plan, including achieving "equal population" and VRA compliance; respecting "communities of interest"; and accommodating "incumbency considerations." JA 97-99. After Republicans gained control of the Legislature in 2012, Republican Delegate Bill Janis sponsored the bill that became the Enacted Plan.

Legislative History. Delegate Janis repeatedly stated that his overriding discretionary objective in the Enacted Plan was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). J.S. App. 55a-58a; JA 116, 351, 364, 370, 449. Janis pursued this objective by preserving "the core of the existing" districts "to the greatest degree possible." J.S. App. 55a-58a; JA 116, 351, 352, 364, 372, 383, 449. Moreover, any minimal changes to the existing districts were not politically harmful to incumbents because Janis uniformly accepted "the input of the existing congressional delegation, both Republican and Democrat," in how their districts should be

drawn. JA 117, 118, 352, 365, 367, 369, 371, 372, 373, 381, 451, 453.

Throughout the floor debates, Janis repeatedly and correctly recited that Section 5 of the VRA prohibited "retrogression of minority voter influence" in District 3. J.S. App. 2a, 21a-23a, 55a-61a; JA 124, 350, 356, 362, 364, 368, 369, 449. Janis also stated that complying with this federal non-retrogression mandate was one of the "paramount concerns" in drafting the Enacted Plan. J.S. App. 2a, 21a-23a, JA 356, 369. Janis explained that this federal mandate was "nonnegotiable." J.S. App. 23a; JA 369.

Janis listed "respect[ing] to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections" by preserving "the core of the existing congressional districts" as the highest criterion after the federal equal population and non-retrogression mandates. JA 351, 352-53, 364, 383, 449.

Plan Details. The census data showed Districts 2, 3, 5, 6, 8, and 9 were underpopulated, while all other districts were overpopulated. *See* JA 136. District 2, a coastal district bordering District 3, was the most underpopulated district. *Id.* District 2 was underpopulated by 81,182 people and needed to move inland in order to equalize its population. *Id.* District 3 was underpopulated by 63,976 people. *Id.* District 4 was slightly overpopulated by 11,273 people, but bordered three underpopulated districts, Districts 2, 3, and 5. *Id.*

In the Enacted Plan, District 2 "gained a little bit of population from District 3," but gained "the majority" of its needed population "from District 1."

JA 753. District 2 borders District 4 at Chesapeake, which is the "home base" and residence of District 4's incumbent, Appellant Randy Forbes. *Id.* Moving District 2 into Chesapeake therefore could have placed District 2's incumbent, Appellant Rigell, in the same district as Appellant Forbes, and "certainly would take the base of Congressman Forbes' district away." JA 753-54.

District 3 gained some population from District 2, but "primarily" gained its needed population when it "took the City of Petersburg" from District 4 and "some precincts in Henrico" and "precincts in Richmond" from District 7. JA 754-55.

The Enacted Plan serves Delegate Janis's highest discretionary priorities by strengthening Republican districts, including the districts surrounding District 3; maintaining the 8-3 pro-Republican split; and preserving cores. JA 520-21. In fact, the Enacted Plan was the only plan proposed at the time or in litigation that preserves the 8-3 split. JA 654-62; Appellants' Br. Re. Standing 5-6 (Oct. 13, 2015). For example, Democratic Senator Mamie Locke proposed a 7-4 plan that turned majority-Republican District 4 into a 60% Democratic district. JA 150. Senator Locke's plan also decreased District 3's BVAP to 41.6% in order to increase District 4's BVAP from 33.5% to 51.1%. JA 148.

The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. JA 524. The Enacted Plan also improves upon the Benchmark Plan with respect to compliance with traditional districting principles. For example, the Enacted Plan splits 14 localities

affecting population, compared to 19 locality splits in the Benchmark Plan. JA 803-05. According to Plaintiffs' sole witness at trial, expert Dr. Michael McDonald, the Enacted Plan "score[s] highly" on locality splits. JA 657.

The Enacted Plan's Democratic opponents in the Legislature "had every reason to criticize the Enacted Plan in the harshest terms possible," but never called the Enacted Plan or Enacted District 3 a racial gerrymander. J.S. App. 69a. Rather, they universally criticized it as a partisan gerrymander that protected 8 Republican incumbents. *See id.* 68a-69a. Moreover, prior to being retained as Plaintiffs' expert in this case, Dr. McDonald authored a law review article in which he described the Enacted Plan not as a racial gerrymander, but as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." JA 649-50, 663, 667, 694; J.S. App. 48a-53a, 66a-71a; Int.-Def. Ex. 55 at 816. He testified that this reflected how the Enacted Plan was "reported in the popular press" at the time. JA 662-63.

Enacted District 3. Dr. McDonald testified that Enacted District 3 "closely resembles" Benchmark District 3 because it perpetuates the same basic Richmond-Norfolk shape originally adopted as the *Shaw* remedy in 1998. JA 686. To the extent the Enacted Plan made changes to District 3, it treated District 3 the same way as all other districts in the Commonwealth, which are majority-white. The Enacted Plan preserved more of the core of District 3 than of two majority-white districts and made relatively minimal changes to benefit the incumbents

in District 3 and adjacent districts. JA 520-21, 522, 525, 643-649, 761-68.

Enacted District 3 has a 56.3% BVAP. JA 131. The Enacted Plan received preclearance and was used in the 2012 and 2014 elections.

C. Plaintiffs' Lawsuit And Alternative Plan

Plaintiffs did not file suit until October 2013, after this Court's decision in *Shelby County v. Holder*. Compl. ¶ 4. Plaintiffs initially posited that, "in the wake of *Shelby County*, Section 5 cannot justify the use of race" in the pre-*Shelby County* Enacted Plan. *Id.* ¶ 43. The eight Appellants then serving as members of Congress intervened as Intervenor-Defendants. *See* J.S. App. 3a-4a.

Plaintiffs eventually shifted to the theory that the Enacted Plan was not narrowly tailored to comply with Section 5. *Id.* 36a-38a. To support their claim, Plaintiffs produced an Alternative Plan that made changes to Enacted Districts 2 and 3, but no changes to any of the other Enacted Districts. JA 686. The Alternative Plan shifts the boundary between Districts 2 and 3. JA 686.

Alternative District 3 has a 50.1% BVAP. JA 686. By Dr. McDonald's own admission, the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3. JA 686-87. Specifically, Dr. McDonald testified that Alternative District 3 was drawn as a majority-black district for predominantly racial reasons. JA 686-701.

Dr. McDonald also agreed that the Alternative Plan undermines the Legislature's "political goals,"

JA 693, because it transforms District 2, a 50/50 district represented by Appellant Rigell, into a 54.9% "heavily Democratic" district, JA 640-41, 668-70, 697. Dr. McDonald acknowledged that the Alternative Plan performs "significant[ly]" worse than the Enacted Plan on the Legislature's incumbency-protection and core preservation principles. JA 889-90. Specifically, while the Enacted Plan preserves 83.1% of District 3's core, the Alternative Plan preserves only 69.2%, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. JA 524, 889-90. The Alternative Plan therefore treats District 3 worse than all majority-white districts with respect to core preservation. JA 524, 889-90.

Dr. McDonald pointed out that the Alternative Plan splits one fewer locality than the Enacted Plan, but he agreed that "no principle" says that avoiding locality splits is "more important than" core preservation or incumbency protection. JA 730. Thus, it would have been "reasonable to choose the Enacted Plan over the Alternative Plan" if the Legislature preferred those principles over respecting localities. JA 730.

Dr. McDonald also testified that Alternative District 3 is slightly more compact than Enacted District 3 on certain compactness measures. JA 725-26. Dr. McDonald conceded, however, that these differences—which were as low as .01—"are relatively small" and "not significant under any professional standard." JA 725-26. He also admitted that compactness measures like the ones he invoked are "inherently manipulable" and that there is no

"professional standard" for judging compactness. JA 726.

D. Dr. McDonald's Concessions

Plaintiffs presented at trial an analysis by Dr. McDonald purporting to show that race predominated in the Enacted Plan's changes to District 3. Dr. McDonald conceded, however, that it would have made "perfect sense" for the Legislature to make those changes to District 3 for "*political*" reasons even if every affected voter "was *white*." JA 648-49 (emphasis added). That is because—according to Dr. McDonald—those changes had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose." JA 643-49.

1. Dr. McDonald first examined the population swaps between District 3 and adjacent districts. He opined "that traditional redistricting principles had been subordinated to race" and that the populations moved into District 3 were more black than the populations moved out of District 3. JA 610-15, 669. Dr. McDonald testified that the populations swapped between Districts 2 and 3 had a BVAP difference of approximately 18%; that the populations swapped between Districts 3 and 4 had a BVAP difference of approximately 34%; and that the populations swapped between Districts 3 and 7 had a BVAP difference of approximately 50%. JA 212, 610-15.

Dr. McDonald admitted that he did not conduct *any* political analysis of these swaps. JA 669. Defense expert John Morgan conducted that analysis and presented the results at trial. Mr. Morgan demonstrated that the political differences in the

swaps were "essentially the same" as the racial differences. JA 522, 761-68. Using election results, Mr. Morgan showed that the population moved from District 2 to District 3 was both 18% more black and 17% more Democratic than the population moved from District 3 to District 2. JA 522, 761-68. Similarly, the population moved from District 4 to District 3 was 34% more black and 33% more Democratic than the population moved from District 3 to District 4. JA 522, 761-68. The population moved from District 7 to District 3 was 50% more black and 49% more Democratic than the population moved from District 3 to District 7. JA 522, 761-68. The swaps between Districts 3 and 1 involved populations of different sizes and moved more Democratic voters into District 3 than into District 1. JA 522, 761-68.

Thus, while the swaps increased District 3's BVAP by 3.2%, JA 807, they also increased District 3's Democratic vote share by 3.3%, JA 520-21.

Dr. McDonald agreed with Mr. Morgan's conclusions regarding the political effect of the swaps, conceded that the swaps showed a "clear political effect," and recognized that the swaps would have made "perfect sense" for political reasons even if every affected voter "was *white*." JA 648-49 (emphasis added). These concessions comported with Dr. McDonald's pre-litigation law review article and the racial bloc voting analysis he presented at trial. That analysis conclusively demonstrated that race and partisan affiliation are highly correlated in District 3: according to Dr. McDonald, somewhere between 96.1% and 104.3% of black voters within

District 3 voted for Barack Obama in 2008. JA 280-81, 705-07.

2 Dr. McDonald also conducted a static analysis of the voting tabulation districts ("VTDs") purportedly "included in or left out of" Enacted District 3. JA 614. Dr. McDonald identified VTDs "in the localities that comprise or are adjacent to the [Enacted] Third District" that have a "Democratic performance greater than 55%," which he describes as "heavily Democratic." JA 247, 614-17. He observed that the average BVAP is 59.5% in the 189 such VTDs in District 3 and 43.5% in the 116 such VTDs in adjacent localities, and concluded "that race had trumped politics" in the decision to include or exclude these VTDs from District 3. JA 614.

Dr. McDonald's own data, however, again revealed a political pattern no different from the racial pattern. Dr. McDonald's analysis treats all 55% "highly" Democratic VTDs as equal, even though many are far more Democratic than 55%. JA 678-80. When actual Democratic vote share numbers are considered, "the highly Democratic VTDs within [District 3] had a BVAP 16 percentage points greater [and] performed 15.5 percentage points better for Democrat[s]" than the 55%-Democratic VTDs in adjacent localities. J.S. App. 75a-76a; JA 544-45.

Moreover, Dr. McDonald conceded that 159 of his 189 55% "heavily" Democratic VTDs in District 3 already were included in Benchmark District 3. JA 614. These VTDs already in majority-black District 3 have a higher average BVAP than the 55%-Democratic VTDs that were in surrounding majority-white districts. JA 437-40, 544-45, 614. Reducing

this disparity would have required moving VTDs in "the middle" of District 3 out of that district, which Dr. McDonald conceded could be done only by "dismantl[ing] District 3 and chang[ing] its form quite dramatically." JA 671.

Finally, Dr. McDonald defined the VTDs excluded from District 3 as any VTDs in "localities" adjacent to Enacted District 3. J.S. App. 74a-75a. Some of these VTDs are up to thirty miles away from District 3's boundary and could not be included in District 3 without substantially redrawing districts. *Id.* 75a.

E. Liability Decision

After trial, Judge Duncan, joined by Judge O'Grady, held that Enacted District 3 is an unconstitutional racial gerrymander. Mem. Op. (DE 109). Judge Payne dissented. *See id.* The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in light of *Alabama*. *See Cantor v. Personhubballah*, No. 14-518.

On remand, the majority issued a substantially similar opinion that repeated its conclusion that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3 in this "mixed motive suit," but nonetheless found a *Shaw* violation. J.S. App. 31a. The majority ordered the Legislature to adopt a remedy by "September 1, 2015." *Id.* 94a. Judge Payne again dissented. *See id.* 45a. Appellants' timely notice of appeal followed.

F. Remedial Proceedings

Governor McAuliffe called the Legislature into a special session to convene on August 17, 2015. The

Senate Democrats, joined by a single Republican, adjourned that session sine die after a few hours. *See* Jim Nolan, "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch, Aug. 17, 2015.

The three-judge court thereafter directed parties and interested non-parties to submit proposed remedial plans. *See* Order (DE 207). The court appointed Dr. Bernard Grofman as a special master to review those proposals and to submit his own proposed remedy. *See* Order (DE 241).

All properly filed proposed remedial plans made at least one Republican district represented by an Appellant majority-Democratic. *See* Appellants' Br. Re. Standing 5-6. The special master's proposed remedial plans unveiled on November 17, 2015 make "major changes in CD3" and "substantial changes in all proximate districts," Final Report 20 (DE 272) ("Rep."), in order to cure purported "fragmentation of minority voting strength . . . in CD4" that Plaintiffs never alleged and purported "packing of minority voting strength . . . in CD3" that Dr. McDonald conceded at trial does not exist, *id.* 65; JA 716. The special master proposes a massive overhaul that splits District 3 in half, lowers its BVAP below the 50% majority level of the Enacted Plan and Plaintiffs' Alternative Plan, and transforms District 4 into a second "minority opportunity" district. Rep. 29. The special master's proposals completely transform District 4—a district with 31% BVAP and 48% Democratic vote share in the Enacted Plan that is currently represented by Appellant Forbes—into a "minority opportunity" and overwhelmingly

Democratic district with more than 40% BVAP and more than 60% Democratic vote share. *See id.* 45, 52.

SUMMARY OF ARGUMENT

1. From the outset, *Shaw* and its progeny have repeatedly emphasized that the Fourteenth Amendment is not violated because race is *a factor* in redistricting, since a legislature is "*always . . . aware* of race when it draws district lines." *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (first emphasis added) (*Shaw I*). The rule could hardly be otherwise because the VRA, particularly Section 5, *requires* that race be a factor by, *inter alia*, providing that covered jurisdictions "*must* . . . preserve existing minority percentages" to the "extent" necessary "to maintain the minority's present ability to elect the candidate of its choice." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (emphasis added).

Since race-consciousness in redistricting does not offend the Constitution, the Court has made clear that a *Shaw* "plaintiff must prove that the legislature *subordinated* traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). For essentially the same reason, and because "race and political affiliation" are often "highly correlated," the Court has also repeatedly emphasized that plaintiffs must meet the "demanding burden" of showing that "race *rather than* politics" caused the alleged subordination of neutral principles. *Easley v. Cromartie*, 532 U.S. 234, 241-43 (2001) (*Cromartie II*); *see also Ala.*, 135 S. Ct. at 1270 ("offsetting traditional race-neutral districting principles" include "incumbency

protection" and "political affiliation"). In short, "what predominance is about" is proving that race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" its boundaries compared to what they would have been if race had not subordinated neutral principles. *Ala.*, 135 S. Ct. at 1270-71.

Accordingly, the law could not be clearer: A *prima facie Shaw* violation is established only if race-affected districts—such as minority districts protected by Section 5—departed from the neutral principles that would be used absent racial considerations, and only if such neutral principles were subordinated to "*race*, rather than politics." Thus, the paradigmatic case where a *Shaw* violation cannot conceivably be found is where the districting principles applied to the minority district are the *same* as those applied to majority-white districts and/or where any potential subordination clearly serves the Legislature's "legitimate political objectives." *Cromartie II*, 532 U.S. at 258. In either situation, race has no "significant impact" or potential for "subordination" because any racial goal is coextensive with both the traditional principles neutrally governing all districts and with the legislature's political objectives. Since race therefore causes no departure from the lines that would be drawn absent race, it cannot subordinate those race-neutral line-drawing principles.

The majority below nevertheless found that race "predominated" without finding either that District 3 departed from the neutral principles governing all eleven districts—protecting incumbents by largely preserving the cores of existing districts—or that it in

any way departed from the district shape and demographics that best furthered Republican political objectives. It found such "subordination" merely because the Legislature *correctly recognized* that the federal mandate of Section 5 was "non-negotiable" and "paramount" to the "permissive" goals of incumbency protection, core preservation and politics. But every legislature (and court) familiar with the Supremacy Clause will articulate and abide by that same truism. Thus, acceptance of the majority's "rank ordering" view of subordination will necessarily mean that *every* recognition of the "non-negotiable" VRA will automatically be deemed an impermissibly "predominant" use of race, even where the legislature correctly identifies and scrupulously implements the VRA's requirements. This not only impermissibly converts VRA compliance from a "compelling" *justification* for racial subordination into an automatic *admission* of such subordination, but will gravely deter such compliance efforts since legislatures will know that any acknowledgement of this "non-negotiable" mandate creates *prima facie* liability under *Shaw*.

Moreover, the majority's notion that "race" "predominates" because the VRA's mandate is "paramount" to voluntary state policies has the perverse result of turning *Shaw*'s command of race-neutral treatment into a requirement that minority districts be treated differently and worse than majority-white districts. Under the majority's backward logic, the Legislature could not preserve District 3 pursuant to the incumbency-protection and core-preservation principles governing all majority-white districts because Section 5 also required such

preservation, and this "mandate" "predominated" over the "permissive" preservation policy applied to the majority-white districts.

2. The majority's erroneous notion that "predominance" is established simply because Section 5 ranks higher than the discretionary neutral principles caused it to eschew the analysis and fact-finding that is actually needed to establish "subordination" to "race rather than politics." Contrary to Appellees' constant refrain, this erroneous failure to examine whether race was inconsistent with or subordinated neutral principles or politics is legal error, and correcting that error requires no second-guessing of the majority's fact-finding.

The *majority* found (as it had to) that it was "inarguably correct" that "partisan political considerations, as well as a desire to protect incumbents, played a role in drawing district lines," rendering this a "mixed motive suit" where the "goal of 'producing majority-minority districts'" was "accompanied by other goals, particularly incumbency protection." J.S. App. 31a (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality op.)). Consequently, it was *particularly* necessary to require Plaintiffs to prove that "race rather than politics" or incumbency protection explained District 3, in order to show that "racial" considerations somehow subordinated the neutral factors that concededly "motiv[ated]" the Legislature in drawing that district. But there is nothing in the majority's opinion even hinting that District 3's shape and racial composition was in any way inconsistent with the political or incumbency-protection motives, much

less that these neutral interests were subordinated to race.

Thus, even assuming *arguendo* that the Legislature required an inflexible 55% (or 53%) BVAP "floor," this could not violate *Shaw* because achieving that floor was the best (and, as far as the record reflects, the only) way to accomplish the Legislature's conceded partisan and incumbency protection objectives. Because District 3's shape and racial composition would have been the same if politics and incumbency protection had been the *sole* motives, "race" could not have "subordinated" these coextensive neutral factors or "changed" District 3's shape or racial percentages. Stated differently, because politics and incumbency protection independently required preserving District 3's basic shape and racial percentages, any requirement (or misinterpretation) of Section 5 mandating such preservation could not have been the "predominant" or even "but for" cause of such preservation.

Thus, the majority's basic error was not any fact-finding it made, but the finding it failed to make (or, more accurately, what it failed to require Plaintiffs to prove). The court was plainly required to find some potential inconsistency between the neutral and racial motives, in order to show some potential for racial subordination of those neutral factors, but never engaged in this fundamental analysis.

3. Moreover, had the majority made the requisite inquiry into potential inconsistencies between racial and neutral factors, it could not have found any because the undisputed facts plainly establish that these factors precisely coincided. Most generally, it is

undisputed that the Legislature treated majority-black District 3 the same as all the other, majority-white congressional districts—the Enacted Plan makes only minor changes to district cores and those changes politically benefit incumbents. The fact that all majority-white districts not subject to Section 5 were preserved just like District 3 is, standing alone, virtually conclusive proof that Section 5's requirement to preserve minority strength was consistent with the neutral principles governing all districts.

Moreover, preserving District 3's shape and BVAP was a political and incumbency-protection *necessity* because any serious alteration of the district shape or reduction in BVAP would send a significant number of overwhelmingly Democratic voters into the four adjacent districts, *all* of which had Republican incumbents. For this reason, Dr. McDonald was forced to concede that it would have made "perfect sense" for the Legislature to adopt Enacted District 3 for *political* reasons even if every affected voter "was *white*." JA 649 (emphasis added). That is because—according to Dr. McDonald—the Enacted Plan's trades involving District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts, from which "[y]ou could infer" a "political purpose." JA 643-49. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a "political gerrymander" that "protected all incumbents" and preserved "a 8-3 partisan division." JA 649-50, 663,

667, 694; J.S. App. 48a-53a, 66a-71a; Int.-Def. Ex. 55 at 816.

Since *all* agree that preserving District 3's core, as well as its trades with adjacent districts, directly furthered the Legislature's "partisan political considerations" and its "desire to protect incumbents," the majority clearly could not have found any inconsistency, much less conflict, between those neutral factors and Section 5 ("race").

4. More specifically, the majority plainly erred because it found a violation even though conceding that "Plaintiffs failed to produce an . . . alternative plan showing 'that the [L]egislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles,'" because the "alternative plan proffered by Plaintiffs accomplishes a more favorable result for Democrats than does the Enacted Plan." J.S. App. 16a, n.12 (quoting *Cromartie II*, 532 U.S. at 258). Thus, Plaintiffs concededly failed to show that "race rather than politics" explained District 3 because they concededly failed to prove that the Legislature could have accomplished its political goals without engaging in District 3's alleged departure from traditional districting principles. Since District 3 with a 56.3% BVAP is the *only* configuration in the legislative or judicial record which accomplishes the Legislature's goal of retaining all Republican incumbents, the Legislature would have adopted that BVAP regardless of Section 5, in order to re-elect those incumbents. Indeed, Plaintiffs' Alternative *confirms* that reducing District 3's BVAP was not a politically viable option, since its reduction of District 3's BVAP

by only 3% (53.1% to 50.1%) alone converted District 2 from a toss-up district with a Republican incumbent into a "heavily Democratic" district. J.S. App. 88a; JA 521-22, 523, 640-41, 668-70, 697.

The majority sought to justify its naked defiance of *Cromartie II's* express requirement that plaintiffs produce a politically *equivalent* alternative on the grounds that this requirement obtains only if (1) *legislators* testify at *trial* to *confirm* the "assumption that the Legislature's political objective was to create an 8-3 incumbency protection plan" and (2) there is no "direct evidence" of a racial motive. J.S. App. 16a n.12, 35a. Both assertions are contrary to common sense, the express language and reasoning of *Cromartie II*, and the general principle that *Shaw* plaintiffs are obliged to prove that race subordinated neutral principles such as politics.

Finally, Plaintiffs' Alternative was inherently incapable of showing what political goals could be accomplished *without* racial subordination, because Alternative District 3 concededly "subordinated traditional districting principles to race" to meet a 50% BVAP "quota." JA 686-87. The majority gave no reason for violating *Cromartie II*'s express requirement of a race-neutral alternative with a "significantly greater racial balance," but, rather, blithely found a *Shaw* violation based on an alternative that concededly constituted a *Shaw* violation.

5. The majority misapplied the Court's decision in *Alabama* when it held that Enacted District 3 was not narrowly tailored to its acknowledged objective of satisfying "the compelling state interest of

compliance with Section 5." J.S. App. 37a. Of all the alternatives proposed at the time or in litigation, the Section 5-compliant Enacted Plan *best* advances the Legislature's core-preservation and incumbency-protection priorities and, thus, *least* subordinates traditional principles to race.

Obviously, the best course is to minimize the inherent tension between the race-conscious demands of the VRA and *Shaw's* race-neutral command by choosing the Section 5-compliant option that is most consistent with the neutral factors governing all districts. As *Alabama* emphasized, it is for legislatures to determine how to best comply with Section 5, so long as they have a "good reason" for selecting the compliant option; they are not required to do only that which is absolutely necessary under Section 5, and no more. 135 S. Ct. at 1274. Here the Legislature had very "good reason[s]" for eschewing the option endorsed by the majority; *i.e.*, reducing BVAP to the point where a "voting analysis" shows that minorities' ability to elect would not be diminished. J.S. App. 9a-10a, 39a-42a. It is undisputed that any such voting analysis would have purportedly "shown" that District 3's BVAP could be reduced to "*30%*" without diminishing the ability to elect, which could only be accomplished by dramatically subordinating core-preservation and incumbency-protection principles, since it would require a massive redraw of this entire area of the state. Moreover, in the real world, it would be extraordinarily difficult, if not impossible, to convince the Justice Department that this massive BVAP reduction somehow did not diminish minorities' ability to elect.

6. As Defendants concede, Appellants have standing to appeal because the judgment necessarily requires transforming at least one Appellant's majority-Republican district into a majority-Democratic district. For example, the special master's proposals reconfigure District 4—a 48% Democrat district currently represented by Appellant Forbes—into an overwhelmingly Democratic district with more than 60% Democratic vote share.

Indeed, Appellants have the same standing they would have if one resided in District 3, because any remedy affects incumbents in the districts surrounding District 3 to the *same extent* as it affects District 3's incumbent. In particular, the judgment requires a remedy that moves black (and overwhelmingly Democratic) voters from District 3 into surrounding Republican districts, and an equal number of non-black (and far less Democratic) voters into District 3 from those districts. Appellants therefore have established the kind of "personal" injury, *United States v. Hays*, 515 U.S. 737 (1995), and "direct, specific, and concrete injury" from the "judgment" that confers standing to appeal, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989).

ARGUMENT

An analogous hypothetical will illustrate the majority's fundamental error. Assume there is a 55% BVAP district totally contained within a 55% BVAP county and the only way to reduce the BVAP would be to cross the county line to pick up white population from the adjacent county. Preserving the district at 55% BVAP by keeping it within the county obviously would not subordinate traditional

districting principles to race, because this option better adheres to the principle of preserving county lines and because the BVAP would have been maintained under that neutral principle, regardless of any racial considerations. Consequently, it is irrelevant whether preserving the district's 55% BVAP was a "non-negotiable" principle "paramount" to preserving county lines, because that racial principle is coextensive with the county line principle, and thus there would be no occasion to choose which should "predominate."

Here, the dominant principle indisputably governing all districts was preserving district cores with only minimal, politically beneficial changes to protect the 8 Republican and 3 Democratic incumbents. Thus, if everyone in District 3 was white, the Legislature would have preserved District 3's core and certainly would have never altered it in a way that sent a significant number of Democratic voters to adjacent districts, because that would directly threaten the re-election prospects of the Republican incumbents residing in all four surrounding districts. Preserving District 3's shape and BVAP was the only way to avoid this incumbent-threatening Democratic exodus, and thus plainly would have been done regardless of any racial considerations. Accordingly, as in the hypothetical, even assuming the Legislature had a firm policy of not reducing District 3's BVAP below 55% (or 53%), this policy could not have "significantly affected" the district's configuration or "subordinated" neutral districting principles: the district would have had the same configuration and BVAP regardless of any BVAP floor, in order to comply with the governing

principle of incumbency protection through core preservation. The majority's failure to even address, much less refute, this dispositive point was clear legal error.

I. THE MAJORITY FAILED TO APPLY *ALABAMA* AND *CROMARTIE II*

Because a legislature "always is *aware* of race when it draws district lines" and such awareness "does not lead inevitably to impermissible race discrimination," *Shaw I*, 509 U.S. at 646, *Shaw* plaintiffs bear the "demanding" burden to prove much more than that the legislature considered race, *Cromartie II*, 532 U.S. at 241. Rather, *Shaw* plaintiffs must prove that the legislature "subordinated" traditional principles—including the "offsetting" "race-neutral districting principles" of "incumbency protection" and "political affiliation"—to "racial considerations." *Ala.*, 135 S. Ct. at 1270. Since "race" cannot even theoretically "subordinate" a traditional principle absent a *conflict* between the two, plaintiffs' threshold burden is to establish such a conflict. *Id.* Thus, *Shaw* can be violated only where race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" the district's boundaries compared to what they would have been if race had not subordinated traditional principles. *Id.* at 1266, 1270-71 (emphases added). But such a racially-driven "impact" is possible only if a conflict between race and neutral principles exists because, absent such a conflict, race and traditional principles independently would have led the legislature to adopt the same redistricting plan. *Id.* Moreover, because race and political affiliation are "highly correlated,"

redistricting decisions with a racial impact also carry a political impact, so plaintiffs bear a particular burden to decouple race from politics, to prove that the legislature subordinated traditional principles to "race *rather than* politics." *Cromartie II*, 532 U.S. at 243.

This requirement to show a conflict between race and traditional principles was particularly obvious and dispositive here. The majority *conceded* that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" the Enacted Plan in this "mixed motive suit." J.S. App. 31a. It therefore was particularly important to show that the alleged "racial" motive subordinated these neutral factors and thereby "changed" District 3's boundaries.

1. Yet, remarkably, the majority found a *Shaw* violation without finding any *inconsistency* between race and politics or protecting incumbents, much less that race predominated over these race-neutral factors. The reason there is no such finding is because none is possible: the *undisputed* evidence established that preserving the core of District 3, and all minor adjustments to it, directly furthered the Legislature's political and incumbency-protection goal of maintaining 8 Republican incumbents. Thus, even if the Legislature had a racial reason for preserving and making minor adjustments to District 3, it also had coextensive *non*-racial reasons. Since these race-neutral reasons *coincided* with any racial reason, it is not possible that race *subordinated* them or that race "affected" District 3's shape or demographics.

2. The majority also ignored *Cromartie II*'s specific directive on *how* plaintiffs must prove that race predominated over non-racial factors. *Shaw* plaintiffs must produce an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. 532 U.S. at 258. The reason for this requirement is obvious. If plaintiffs cannot produce an alternative free from racial predominance that achieves the legislature's political (and other traditional) objectives, they have failed to prove that politics is not the cause of the district's shape and demographics. If the political goals can reasonably be accomplished only through the district chosen by the legislature, race cannot be the predominant factor because the district would have been created even absent racial considerations, in order to accomplish the desired political result.

The majority, however, found a *Shaw* violation even though Plaintiffs produced no such alternative. To the contrary: Plaintiffs' majority-black Alternative District 3 concededly contravenes the Legislature's political objectives by converting a Republican incumbent's adjacent district into a "heavily Democratic" one and concededly contravenes the Legislature's race-neutral incumbency-protection and core-preservation priorities. Moreover, it concededly embodies the racial flaws that purportedly infected the enacted district—in Dr. McDonald's words, "subordinat[ing] traditional districting principles to race" to achieve a "50%" black "quota." JA 686-87. Plaintiffs' failure to show that the Legislature's political objectives could be accomplished through

any alternative means (much less a non-subordinating alternative) establishes that Enacted District 3 is the *only* means of accomplishing them (and therefore that politics necessarily predominates over race).

The majority blithely suggested that the dissent's criticism that Plaintiffs' Alternative Plan produced only a 7-4 Republican ratio "relies on an *assumption* that the legislature's objective was to create an 8-3 incumbency protection plan." J.S. App. 16a n.12 (emphasis added). But the "assumption" that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense and is the very assumption underlying *Cromartie II*. *See* 532 U.S. at 242, 258. And it is not even an "assumption" because (1) the majority itself *found* that "protecting incumbents" motivated the Legislature; (2) Delegate Janis repeatedly *stated* this objective; (3) every contemporaneous commentator (including Dr. McDonald) acknowledged it; and (4) the Enacted Plan has the clear *effect* of maintaining the 8-3 split. *See* J.S. App. 48a-53a; 68a-71a; *supra* pp. 3-7.

3. The majority nonetheless rested its finding that race "predominated" on the unremarkable fact that "race" was a *higher-ranked* criterion than the neutral criteria. J.S. App. 2a, 21a-23a. Specifically, the majority found that Delegate Janis's correct recitation that Section 5 prohibited "retrogression [of] minority voting influence" in District 3 was a racial purpose. *Id.* 2a, 21a-23a. It then opined that this "racial" purpose "predominated" because Delegate Janis correctly noted that this *federal* mandate was "nonnegotiable" and "paramount," while *state-law*

neutral principles were merely "permissive." *Id.* 2a, 21a-23a. This tautology is facially erroneous and would automatically invalidate all legislative and *judicial* redistricting in Section 5 jurisdictions, because *every* such jurisdiction acknowledges the Supremacy Clause truism that Section 5's *federal mandate* is paramount to *all* traditional principles, since all are "permissive." *See Abrams v. Johnson*, 521 U.S. 74, 96 (1997); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (three-judge court).

First, even if the Legislature had announced that it would not allow District 3's BVAP to go below 55% for reasons *unrelated* to Section 5, this would not suggest that it subordinated neutral principles to race. *Cromartie II*, 532 U.S. at 253. Such "direct evidence" of a desired "racial balance" "says little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* That comparative predominance analysis can only be resolved under the *Cromartie II* methodology eschewed by the majority; *i.e.*, by determining whether plaintiffs have eliminated politics and traditional principles as explanatory variables by showing that those objectives conflicted with achieving the desired "racial balance" and could be accomplished through an alternative with a "significantly different racial balance."

Particularly since race and politics are so "highly correlated" in Virginia (and elsewhere), it is quite plausible that the BVAP resulting in Enacted District 3 directly furthers the Legislature's political interests and would be pursued absent any "racial" motive. *See id.* at 245. If, as here, plaintiffs do not satisfy

their burden of negating that plausible scenario, they have not shown that "race rather than politics" explains the district, *regardless* of whether the Legislature rank-ordered "race" above "politics." Here, Plaintiffs *confirmed* that *politics does* explain maintaining District 3's BVAP. Plaintiffs' Alternative Plan's modest 3% reduction in District 3's BVAP turned neighboring District 2, a toss-up district represented by Appellant Rigell, into a 54.9% "heavily Democratic" district, creating a 7-4 partisan division. JA 520-21, 522, 640-41, 668-70, 697; J.S. App. 88a.

That being so, it does not matter whether the racial factor is ranked above the non-racial principle because they both head in the same direction, and thus there will be no need to choose *between* these *non-conflicting* factors. *See Ala.*, 135 S. Ct. at 1266-71; *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (legislature may subordinate traditional principles to gerrymander (or support) Democrats "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact") ("*Cromartie I*"); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court) *summ. aff'd*, 133 S. Ct. 29 (2012). Indeed, finding that "race"—*i.e.*, Section 5 compliance—"predominated" because it was a "nonnegotiable" criterion "superior" to "permissive" neutral principles is just as illogical as finding that "race" did *not* predominate because the neutral "nonnegotiable" *constitutional* requirement of population equality is "superior" to Section 5's *statutory* requirements. *See Ala.*, 135 S. Ct. at 1270-72.

Second, the majority's analysis is at war with this Court's treatment of VRA compliance under *Shaw*. The Court treats VRA compliance as a governmental interest so compelling that it even justifies subordination of neutral principles to race. J.S. App. 37a-38a.[1] This rule recognizes that legislatures must be provided some way of complying with the potentially conflicting demands of the race-conscious VRA and the race-neutral Fourteenth Amendment. *See Ala.*, 135 S. Ct. at 1274. The majority turned this principle on its head. The majority squarely found, as a factual matter, that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5." J.S. App. 37a. But it improperly converted this compelling interest sufficient to *justify* racial subordination into a direct *admission* of such subordination.

Far from reconciling the conflicting demands of the VRA and the Fourteenth Amendment, the majority's approach places them in irreconcilable conflict by treating any effort at VRA compliance as a *prima facie* Equal Protection violation, even if such compliance causes no departure from what race-neutral policies would have dictated. Importantly, this is true even if the legislature correctly understands the VRA's requirements and narrowly tailors its plan to achieve such compliance. Such a "narrowly tailored" plan has the same *purpose* as the Legislature here—Section 5 compliance—and it is

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[1] Eight justices have so recognized. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 475 n.12, 485 n.2, 518 (2006).

this "racial" purpose the majority says "must" be subjected to "strict scrutiny." *Id.* 36a-40a; *see also id.* 18a n.13 ("The fact that the legislature considered race a predominant concern only because it believed federal law compelled it to do so is of no current legal consequence."). Thus, even a legislature that correctly understands and implements Section 5's non-retrogression requirements has committed a *prima facie* violation, because Section 5 "predominates" over voluntary neutral principles. Under this regime, then, all *Shaw* cases bypass the demanding *prima facie* showing and turn entirely on whether defendants have satisfied the "narrowly tailored" prong of strict scrutiny.

4. Finally, the majority violated *Shaw* by converting its racial-equality command into a requirement to treat minority districts differently and worse than majority-white districts. There is no dispute that the Legislature treated majority-black District 3 the same as all of the other, majority-white congressional districts—the Enacted Plan makes only minor changes to district cores and those changes politically benefit incumbents. The fact that all majority-white districts not subject to Section 5 were preserved just like District 3 underscores that Section 5's requirement to preserve minority voting strength was consistent with the neutral principles governing all districts. Under the majority's backward logic, however, the Legislature was precluded from doing the same incumbency protection in District 3 that it voluntarily did in the majority-white districts, because Section 5's preservation command "predominated" over this "permissive" preservation policy.

Accordingly, the majority requires treating minority districts and incumbents worse than their white counterparts, because it precludes preserving such Section 5-protected districts in the same way as majority-white districts unprotected by Section 5. The Fourteenth Amendment and *Shaw* obviously cannot require treating certain districts worse because of their predominantly minority racial composition. *See Ala.*, 135 S. Ct. at 1270.

The majority then exacerbated this perversion of *Shaw* by using Plaintiffs' Alternative Plan—which concededly "subordinates traditional districting principles" to achieve a 50% black "quota"—as the principal proof that District 3 shared these defects, without evaluating whether a district where race did *not* predominate would have equally complied with the Legislature's non-racial goals. Thus, the majority converts the *Shaw* inquiry from whether a majority-minority district subordinated traditional principles relative to one not infected by race into a "beauty contest" between two majority-minority districts where the "winner" is the one that (marginally) better complies with the *court's* view of proper districting principles and *plaintiffs'* political goals, although it is concededly worse in terms of the Legislature's preferred race-neutral principles. This obviously does nothing to further racial neutrality, but simply substitutes one racially-driven district that *contravenes* the Legislature's political desires for one that furthers them. *Shaw* obviously does not authorize, much less require, the federal judiciary to hand the minority party a political victory in court that it could not secure through the democratic process.

II. THE MAJORITY ERRED IN FAILING TO REQUIRE PROOF THAT RACE RATHER THAN POLITICS PREDOMINATED

A more detailed discussion confirms the majority's error in finding a *Shaw* violation without finding that race conflicted with "incumbency protection" and "political affiliation," *Ala.*, 135 S. Ct. at 1270, and that "race *rather than* politics" predominates in Enacted District 3, *Cromartie II*, 532 U.S. at 243; *see also Cromartie I*, 526 U.S. at 551. After finding that "protecting incumbents" and "political considerations" "inarguably" "motiv[ated]" the Legislature, J.S. App. 31a, the majority failed to resolve whether Plaintiffs had disproved their predominance over race. Instead, it contented itself with the observation that politics *might* not have predominated because the Legislature's acknowledged political purposes "*need not* in any way refute the fact that race was the legislature's predominant consideration." *Id.* 32a (emphasis added). But the truism that politics "need not" be the Legislature's purpose is no substitute for the requisite finding that it *was not*, particularly since consideration of *race* "need not in any way refute the fact that" *politics* was "the legislature's predominant consideration." *Id.* It is precisely because race and politics are invariably present in redistricting and "highly correlated" that this Court requires plaintiffs to prove *which* factor predominated. *Cromartie II*, 532 U.S. at 242.

A. The Undisputed Facts Establish That Politics Explains District 3

The majority *could not* have made the required finding because it is *undisputed* that:

- All contemporaneous commentators—including Plaintiffs' expert—described the Enacted Plan as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." JA 649-50, 663, 667, 694; J.S. App. 48a-53a, 66a-71a;
- *Every* piece of electoral data confirms that the Enacted Plan has this "clear political *effect*." JA 643-49 (emphasis added);
- *Plaintiffs'* expert, Dr. McDonald, agreed that it would have made "perfect sense" to adopt the Enacted Plan for *political* reasons even if every affected voter "was white." JA 648-49;
- The Legislature's treatment of District 3—preserving its core with minimal politically-motivated changes—was to the same as its treatment of the majority-white districts;
- Delegate Janis repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals;
- Delegate Janis disclosed that the plan uniformly followed incumbents' "specific and detailed recommendations" for their own districts. JA 451; *see also* JA 117, 118, 352, 365, 367, 369, 371, 372, 373, 381, 451, 453;
- No alternative plan preserves the 8-3 split and protects all incumbents; and

- Any effort to significantly adjust District 3's racial composition would spread Democrats into the adjacent districts and harm Republican incumbents.

See supra pp. 3-12.

The undisputed evidence more than confirms Dr. McDonald's concessions about the Enacted Plan's political effect—and underscores that the majority could *not* have found racial predominance. The 2010 elections resulted in the 8-3 partisan split—and *preserving* District 3's core was needed to freeze that split. Also, as Dr. McDonald conceded, the relatively minor *changes* to District 3 were all "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. JA 643-49. Indeed, the Enacted Plan increased District 7's Republican vote share by 2.4%, District 1's by 1%, District 4's by 1.5%, and toss-up District 2's by 0.3%. JA 520-21.

The majority's finding that the swaps involving District 3 and surrounding districts had a racial effect, J.S. App. 32a, does not remotely suggest otherwise, because they had a virtually identical *political* effect. District 3's 3.2% BVAP increase mirrors its 3.3% increase in Democratic vote share. JA 520-21. This is also true of District 3's swaps with *all* adjacent districts. The swaps between Districts 2 and 3 had a 17% Democratic vote share difference and an 18% BVAP difference. *See* JA 522, 761-68. The swaps between Districts 3 and 4 had a 33% Democratic vote share difference and a 34% BVAP difference. *See* JA 522, 761-68. The swaps between Districts 3 and 7 had a 49% Democratic vote share

difference and a 50% BVAP difference. *See* JA 522, 761-68. (The swaps between Districts 3 and 1 involved populations of different sizes and moved more Democratic voters into District 3 than into District 1, thereby reflecting the same incumbency-protection effect as the other swaps. *See* JA 522, 761-68.) Accordingly, contrary to the majority's assertion, the Enacted Plan, just as in *Cromartie II*, "furthered the race-neutral political goal of incumbency protection to the same extent as it increased the proportion of minorities within the district." J.S. App. 32a.

B. The Legislative History Demonstrates That Politics Explains District 3

The fact that politics explains Enacted District 3 is unsurprising because Delegate Janis *expressly said so* repeatedly, in a display of candor rarely seen in redistricting. *See* J.S. App. 54a-62a; JA 116, 351, 364, 370, 449. Delegate Janis said his overriding objective was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). J.S. App. 55a-58a; JA 116, 351, 364, 370, 449. Accordingly, the Enacted Plan preserved "the core of the existing" districts "to the greatest degree possible." J.S. App. 55a-58a; JA 116, 351, 352, 364, 372, 383, 449. Moreover, any minimal changes were not politically harmful to incumbents because Delegate Janis strictly adhered to "the input of the existing congressional delegation, both Republican and Democrat," in how their districts should be drawn.

JA 117, 118, 352, 365, 367, 369, 371, 372, 373, 381, 451, 453.

Janis candidly noted that "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress," including Congressman Scott in District 3. JA 451. After the Enacted Plan was drawn, Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." JA 352, 451; J.S. App. 56a. Consequently, *every* contemporaneous commentator—including Democratic opponents and Dr. McDonald—described the Enacted Plan as a "partisan gerrymander" that preserved the 8-3 split and "protected all incumbents." JA 649-50, 663, 667, 694; J.S. App. 48a-53a, 66a-71a.

Thus, all contemporaneous legislative history and Plaintiffs' own concessions uniformly confirm that Enacted District 3 directly served the Legislature's political interests of returning 8 Republicans to Congress. Unable to dispute this, the majority hinted (although it could not actually find) that, for the first time in American history and for some wholly unexplained reason, a legislature did not want to re-elect congressional incumbents of the majority party. It so concluded because Janis's statements were "rather ambiguous," and because Janis did not personally consider "partisan performance" statistics, show "the *entire* 2012 Plan" to incumbents, or consult incumbents' prospective "*challengers*." J.S. App. 33-

34a (emphasis added). Delegate Janis, however, had no need to consider "partisan performance" statistics because the incumbents who effectively drew their own districts considered such performance, and their self-interested approval of their own districts added up to a *statewide* incumbency protection plan across "the entire" Enacted Plan. And, of course, failure to consult incumbents' *challengers* only confirms that the purpose was to protect incumbents. Janis's statements are not remotely "ambiguous" about incumbency protection, particularly since objective electoral data confirmed that the Plan would have precisely such an "effect" (as it did in 2012 and 2014).

III. PLAINTIFFS DID NOT PROVE THAT RACE RATHER THAN POLITICS PREDOMINATED

The majority attached talismanic significance to Delegate Janis's statements that his "paramount" concern was to avoid "retrogression." As noted, this is error for two reasons.

First, even racial goals *unconnected* to the VRA do not establish that "race *rather than* politics" subordinated traditional principles. *Cromartie II*, 532 U.S. at 243. Such a *prima facie* case requires demonstrating that the legislature "could have achieved its legitimate political objectives" with an alternative plan where race did not predominate. *Id.* at 258. This is because "direct evidence" of a racial motive "says little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* at 253. Thus, even if the Legislature had established a BVAP floor unconnected to the VRA, there is no *prima facie* case because there is

concededly no showing or finding that this "changed" what the Legislature would have done if politics had been its sole motive. *Ala.*, 135 S. Ct. at 1270.

In any event, Janis's statements *correctly* recited Section 5's VRA requirements, which is not an admission that race predominated, but instead simply an acknowledgment that federal law predominates over state law.

A. The Majority Erred In Failing To Require Plaintiffs To Produce A Politically Equivalent Alternative

Even assuming the Legislature decided that a 55% BVAP level was needed to avoid retrogression in a 53.1% BVAP district, that would not establish a *prima facie Shaw* violation because the majority made no finding and required no proof that the Legislature's political objectives could have been achieved at a lower BVAP.

Cromartie II requires a plaintiff to produce an alternative plan that "achieve[s] [the legislature's] political objectives in alternative ways" free of the alleged subordination of traditional principles to race. 532 U.S. at 258. Here, however, the majority found a violation although Plaintiffs' Alternative Plan *concededly* undermines the Legislature's "political goals" because it transforms District 2 into a "heavily Democratic" district and produces a 7-4 partisan split. JA 640-41, 668-70, 693, 697.

The majority sought to justify its facial defiance of *Cromartie II*'s explicit requirement of a politically equivalent alternative on two bases. *First*, plaintiffs purportedly need not produce such an alternative in their *prima facie* case unless the defendant (in

rebuttal) proves through "overwhelming evidence," including "trial testimony by state legislators," that the legislature had "political objectives." J.S. App. 32a-33a. Absent such testimony, the majority could not engage in the "assumption" that the Legislature wanted to return all 8 Republican incumbents to Congress. *Id.* 16a n.12.

But *Cromartie II* "*generally*" requires *all* plaintiffs "at the least" to disprove politics (where it highly correlates with race), 532 U.S. at 258 (emphasis added), precisely because of the "assumption" that "[p]olitics and political considerations are inseparable from districting," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). This *prima facie* burden clearly does not depend on the defendant's *rebuttal* evidence, much less "trial testimony by state legislators." The absence of any need for trial testimony is particularly obvious where, as here, the *contemporaneous* legislative history evinces a clear 8-3 incumbency-protection purpose, *see supra* Part II.B—which is presumably why *Plaintiffs* offered no legislator testimony to support their racial theory. Defendants obviously are not required to waive legislative privilege, *Tenney v. Brandhove*, 341 U.S. 367 (1951), to trigger the *Cromartie II* burden, and such post-hoc testimony is far less probative of "the legislature's actual purpose" than statements that were "before the General Assembly when it enacted" the Plan, *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 & 910 (1996) (*Shaw II*); *Cromartie I*, 526 U.S. at 549 (political data and expert testimony "[m]ore important" than after-the-fact legislator testimony).

Indeed, the majority's *Cromartie II* citation does *not* refer to legislator testimony, but instead to the

political explanation offered by "the State," where "the key evidence consisted primarily of documents and expert testimony." 532 U.S. at 242, 243.

Second, the majority contended that plaintiffs are relieved of their *Cromartie II* burden where there is "direct evidence" of an alleged racial objective in the legislative history. J.S. App. 35a. To the contrary, *Cromartie II* establishes that "direct evidence" that (unlike here) explicitly requires, for example, a specific "racial balance" in the challenged plan, is barely probative because it "says little or nothing about whether race played a *predominant* role comparatively speaking." 532 U.S. at 253. The majority thus has it precisely backwards. *Cromartie II* insisted on plaintiffs producing an alternative that was politically equivalent and had a "significantly different racial balance" than the challenged district(s), precisely because even direct pronouncements about racial purposes do not remotely resolve the dispositive question whether such purposes, "*rather than* politics," explain the district. That comparative predominance issue can only be resolved by examining whether political goals could be accomplished without the allegedly racially motivated distortions. Yet the majority ruled that such "direct evidence" on race *forecloses* this essential relative predominance inquiry.[2]

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[2] The majority also said that Plaintiffs' *Cromartie II* burden may be satisfied by something other than an "alternative *plan*." J.S. App. 16a n.12 (emphasis added). While this may theoretically be true, Plaintiffs' chosen alternative *was* a plan, and it is quite difficult to *envision* an "alternative" other than a plan,

B. Delegate Janis's Statements Do Not Show Racial Predominance

The majority repeatedly contended that race "predominated" because of legislative statements that "one of the paramount concerns" upon which the Legislature was "most especially focused" was not to violate "nonnegotiable" Section 5 by "retrogress[ing] minority voting influence" in District 3. J.S. App. 2a, 8a, 21a-23a; *see also id.* 8a (Democratically-authored Senate Criteria recognizing "priority" of "mandatory" VRA over "permissive" state law). But the assertion that Section 5 mandatorily prohibits "retrogress[ing] minority voting" power is a routine and correct recitation of that federal non-retrogression command. *See* J.S. App. 2a, 21a-23a, 55a-61a; JA 124, 350, 356, 362, 364, 368, 369, 449. These *echo* the Court's description of Section 5's requirements. *See Ala.*, 135 S. Ct. at 1274.[3]

At points, the majority sought to convert this correct view of Section 5 into a reflexive BVAP "floor" analogous to *Alabama*. J.S. App. 20a-21a. But the majority's selective recitation of the record fails to

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particularly since the majority does not identify any such "alternative." *Id.*

[3] Thus, the majority's attempt to analogize to *Shaw II* is clearly off-base. J.S. App. 35a-36a. The "overriding purpose" in *Shaw II* reflected an *inaccurate* construction of the VRA (because it interpreted Section 5's *non-retrogression* command as requiring *additional* minority districts), and the State conceded that the challenged district racially subordinated traditional principles, including "incumbency protection." 517 U.S. at 906, 912-13. Here, Janis's statements *accurately* construe the VRA, and "race" is coextensive with incumbency protection.

establish the existence of any 55% BVAP "floor" or any racial subordination of traditional principles. First, the majority rips out of context Delegate Janis's response to a question on the House floor. *Id.* 21a. The discussion was about whether the Legislature should adopt Senator Locke's plan, which reduced *District 3's* BVAP to around *41%* in order to raise the BVAP in adjacent *District 4* to 51%. *See id.* A Democratic legislator asked for "empirical evidence" that "55% BVAP is different than 51% or 50%" or whether 55% was "just a number that has been pulled out of the air," to which Janis responded regarding "weighing a certainty against an uncertainty." J.S. App. 21a; JA 397. Thus, Janis was explaining that the Enacted Plan with "about 56%" BVAP in majority-black District 3 was "certain" to receive preclearance, while reducing District 3's BVAP "from 56 percent African-American population to 40 percent" would be "uncertain" to receive preclearance, because it created "a reduction in minority voter influence in the 3rd Congressional District." JA 394-98. Contrary to the majority's false implication about this discussion concerning *District 4*, Janis was plainly not saying that he would not reduce District 3's Benchmark BVAP (which was 53.1%, not 55%) to 50% or 51%. *See* JA 394-98.

The majority invents another statement by Janis when it suggests that he "emphasized that his 'primary focus' . . . was ensuring that the Third Congressional District maintained at least as large a percentage of African-American voters as had been present in the district under the Benchmark Plan." J.S. App. 22a. But the end of the majority's sentence is not in quotation marks because Janis never said

"maintained at least as large a percentage"—those words are purely the majority's. Rather, Janis simply repeated the Section 5 truism that "the primary focus . . . was to *ensure that there be no retrogression in the Third Congressional District*." JA 369 (emphasis added).

Unable to twist Delegate Janis's statements into admissions of a 55% BVAP "floor," the majority contended that defense expert John Morgan "acknowledged that the legislature adopted" a 55% BVAP "floor" for Enacted District 3. J.S. App. 20a-21a. If Mr. Morgan had said this, it would not reflect the Legislature's purpose or "direct evidence" of any kind, because, as the majority itself notes, he "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. *Id.* 21a n.16. Anyway, Mr. Morgan never suggested any 55% quota; he simply noted that the *state* redistricting plan enacted in *2011* (with a Democrat-controlled Senate) contained 55% BVAP districts and enjoyed bipartisan and biracial support, which provided the Legislature a strong basis for believing that a district with a similar BVAP, far from over-concentrating black voters, was a legitimate option for achieving Section 5 preclearance. *See id.* 66a-67a.[4]

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[4] Unable to find a *55%* floor, the majority inconsistently suggests there was a *53.1%* floor by citing a lone statement where Janis said that "[w]e can have no less" BVAP "percentage of African-American voters than percentages that we have under the existing lines." J.S. App. 22a; *see also* JA 119-20, 357. But Janis hastened to point out that the lines in Enacted District 3 also were drawn "not to disrupt the lines of the current districts any more than you have to given population

In short, the use of purportedly "direct evidence" here vividly exemplifies why *Cromartie II* eschewed such evidence in favor of the plaintiffs' politically equivalent alternative.

C. Plaintiffs' VTD Analysis Cannot Show Racial Predominance

The *only* evidence the majority analyzed that is even relevant to whether race or politics explains District 3 was Dr. McDonald's VTD analysis. The majority relied on this analysis to support its assertion that the "population swaps and shifts used to create the Third Congressional District suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district." J.S. App. 34a. This completely misportrays Dr. McDonald's analysis, which had nothing to do with "population swaps and shifts" between District 3 and adjacent districts, and, anyway, the analysis embodies precisely the same

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shifts, et cetera," JA 119-20, and that he took into account the "recommendations" of "Congressman Scott in the 3rd Congressional District," JA 359-60. Thus, Janis confirmed that the Legislature would have drawn the lines exactly the same way *regardless* of race. *See id.*

The majority also contends that *Appellants* said *Defendants* conceded the existence of a BVAP floor. J.S. App. 20a-21a. But Appellants were describing *Plaintiffs'* concession that race was considered to achieve Section 5 *compliance*, thus foreclosing any finding that the Enacted Plan was based on "an *improper* consideration of race." JA 7-9 (emphasis added); J.S. App. 20a-21a. Anyway, this statement was not uttered by Defendants, and *post hoc* litigation statements by strangers to the redistricting process are plainly irrelevant. J.S. App. 48a n.34.

flaws as a report rejected as clearly erroneous in *Cromaritie II*.

First, Dr. McDonald concededly did not analyze VTD swaps but looked at *all* VTD's over "55%" "Democratic," *not* just those which had been "swapped" to create the challenged District 3. JA 247, JA 613-17. Indeed, *159* of Dr. McDonald's *189* 55% Democratic VTDs in District 3 *already* were included in *Benchmark* District 3. JA 247, 614-17. Thus, this static VTD analysis "proves" only what the Legislature *stated* it was doing—preserving District 3's core—but says nothing about whether the 2012 version of District 3 was racial rather than political. Of course, VTDs in majority-black Benchmark District 3 necessarily have a much higher BVAP than those located in the surrounding majority-white Benchmark districts. JA 437-40, 544-45. Reducing this disparity would have required moving VTDs in "the middle" of District 3, which could only be done, as Dr. McDonald conceded, by "dismantl[ing] District 3 and chang[ing] its form quite dramatically"—thus violating core preservation and incumbency protection. JA 670-71.

As explained, the only analysis of VTD *swaps* demonstrated that they had a political effect identical to their racial effect. *See supra* pp. 9-10. Indeed, Dr. McDonald *agreed* with Mr. Morgan's showing of such a coextensive political effect. *See id.*; JA 643-49.

In any event, the relied-upon VTD analysis is even *less* defensible than the analysis this Court rejected as a matter of law in *Cromartie II*. *See* J.S. App. 34a. There, the Court concluded that the VTD analysis "offer[ed] little insight into the legislature's true

motive" and overturned as clearly erroneous the three-judge court's judgment that relied upon it. 532 U.S. at 248. First, the expert had not shown whether "the excluded white-reliably-Democratic precincts were located near enough to [the challenged district's] boundaries or each other for the legislature as a practical matter to have drawn District 12's boundaries to have included them, without sacrificing other important political goals." *Id.* Moreover, while all of the examined precincts "were at least *40%* reliably Democratic[,] . . . virtually all the African-American precincts included in [the district] were *more* than 40% reliably Democratic." *Id.* Because the legislature's objective was to make the district "as safe as possible" politically, it "sought precincts that were reliably Democratic, not precincts that were *40%* reliably Democratic, for obvious political reasons." *Id.*

Dr. McDonald's analysis suffers from both of these "major deficiencies." J.S. App. 75a. *First*, as in *Cromartie II*, the analysis includes VTDs not "located near enough" to District 3 to be included "as a practical matter." 532 U.S. at 247. Dr. McDonald examined VTDs in "*localities*" adjacent to Enacted District 3, which includes VTDs up to *thirty miles away* from District 3's boundary. J.S. App. 74a-75a; JA 670-71, 771.

Second, Dr. McDonald lumps together all 55% and above Democratic VTDs, even though many "African-American precincts" are far more Democratic than 55%—so he has not shown that "the excluded white precincts were as reliably Democratic as the African-American precincts that were included in" District 3. *Cromartie II*, 532 U.S. at 247. When this basic flaw

is corrected, the VTDs analyzed by Dr. McDonald reveal a *political* pattern no different from their *racial* pattern. Based on Dr. McDonald's own analysis and not Mr. Morgan's analysis the majority (falsely) contends is incorrect, "while the highly Democratic VTDs within [District 3] had a BVAP *16* percentage points greater, they also performed *15.5* percentage points better for Democrat[s]" than the "excluded" VTDs in adjacent localities. J.S. App. 75a-76a (emphasis added); JA 544-45. Similarly, the VTDs *added* to District 3 in 2012 also had a BVAP 12.8% higher, and a Democratic vote share 12.2% higher, than the "excluded" VTDs. JA 437-40, 544-45. Dr. McDonald thus has done nothing to undermine the conclusion that the Legislature, "by placing reliable Democratic precincts within a district without regard to race, end[ed] up with a district containing more heavily African-American precincts, but the reasons w[ere] political rather than racial." *Cromartie II*, 532 U.S. at 245-46.

Indeed, Dr. McDonald's VTD analysis cannot show a racial purpose to "*increase* the proportion of minorities" in District 3 because *Plaintiffs' own* Alternative Plan shows a similar pattern though its avowed purpose was to *decrease* District 3's BVAP. JA 687-88. Dr. McDonald's own data confirms that the 160 "highly Democratic" VTDs in Plaintiffs' Alternative District 3 are *13.5% more black* (and 11.8% more Democratic) than the 145 "highly Democratic" VTDs in localities adjacent to Alternative District 3. *See* JA 437-40, 544-45.

IV. DISTRICT 3 DOES NOT SUBORDINATE TRADITIONAL DISTRICTING PRINCIPLES

1. Even assuming race explains District 3's shape, there is no *Shaw* violation because District 3 does not subordinate neutral principles. Indeed, it is undisputed that the Enacted Plan best serves the traditional districting principles the Legislature prioritized and applied to all districts statewide. As noted, the Enacted Plan is the *only* plan produced at the time or in litigation that protects all 8 Republican and 3 Democratic incumbents. It also does the best job of core preservation. Dr. McDonald *conceded* that Plaintiffs' Alternative "undermines" the Legislature's incumbency-protection goals and performs "significant[ly]" *worse* on the core-preservation goal the Legislature prioritized over all other traditional principles. JA 889-90.

2. The majority avoided this conclusion only by focusing exclusively on *other* traditional principles the Legislature prioritized *lower* than core preservation and incumbency protection. *See* J.S. App. 24a-27a. But all of the majority's criticisms flowed from the Legislature's decision to preserve the cores of the Benchmark districts. Indeed, the locality splits, alleged lack of compactness, and use of water contiguity the majority relied upon, *see id.*, were all *inherited* from Benchmark District 3, which perpetuated the 1998 *Shaw* remedy, *see supra* pp. 3-12. In fact, the Enacted Plan *improved* upon the Benchmark Plan by, for example, reducing the number of locality splits from 19 to 14. JA 803. As Dr. McDonald conceded, the Enacted Plan "scored highly" on locality splits. JA 657. The only reason

the Alternative Plan contained one fewer locality split than the Enacted Plan was because it did "significantly" worse in preserving District 3's core. JA 889-90.

Thus, it was not *race* that subordinated the majority's principles, but *core preservation*. Of course, it was the province of the Legislature to "balance" its priorities against "competing" principles—and courts are not permitted to upset that balance in *Shaw* cases. *Miller*, 515 U.S. at 915; *Bush*, 517 U.S. at 977 (plurality op.) (enacted district need not "defeat rival districts designed by plaintiffs' experts in endless 'beauty contests'"). Here, preserving District 3's core made unusually good sense for the independent reasons that District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, had not been challenged under *Shaw* in the 2001 *Wilkins* case, and was politically beneficial to Republican incumbents, JA 643-49.

In contrast, avoiding locality splits has not been an important principle in Virginia for decades. The Virginia Constitution was amended in 1970 to *eliminate* respect for "political subdivisions." Int.-Def. Ex. 55 at 782. In 2000, the Legislature identified by statute certain important traditional principles; respecting localities was not included. Va. Code Ann. § 24.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency," but not respecting political boundaries, as traditional principles. *Wilkins*, 264 Va. at 464.

While ignoring these dispositive points, the majority bizarrely criticized the Enacted Plan for not *sufficiently* preserving District 3's core, because it moved more than the bare minimum number of people needed to achieve population equality in that District (when unrealistically viewed without regard to the population needs of *other* districts). J.S. App. 28a. But *more* core preservation would have *exacerbated* departure from the majority's principles and the stated policy was not to make only those changes required by population equality, but to preserve the cores of districts (with minor swaps to bolster incumbents politically). It is undisputed that District 3 fulfilled those criteria as well as its majority-white counterparts, since more of its core was preserved than two such districts and the additional swaps bolstered incumbents. JA 524, 643-49. In contrast, the Alternative Plan the majority praises preserves *less* of the core of District 3 than of *every majority-white* district, *see* JA 524, and moves more than *twice* as many people in and out of District 3 than the Enacted Plan, JA 270.

Similarly, the majority's concerns about District 3's compactness are wildly overblown. District 3's compactness is not materially different than other districts because it scores only *.01* less than the second-least compact (majority-white) district. J.S. App. 77a-79a. Dr. McDonald conceded that these differences "are relatively small" and "not significant under any professional standard." JA 725-26. He also admitted that compactness measures like those the majority invoked are "inherently manipulable" and that there is no "professional standard" for judging compactness. JA 726.

Further, the majority criticized Enacted District 3 for using "water contiguity," though it recognized that water contiguity is "legal[]." J.S. App. 26a. The majority also took issue with the Enacted Plan's VTD splits, *id.* 27a, notwithstanding Dr. McDonald's concession that avoiding VTD splits is not a traditional principle, JA 726-28. The majority nonetheless condemned the Legislature for availing itself of these permissible methods because they were purportedly used for racial reasons. J.S. App. 24a-30a. But *Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles. *Ala.*, 135 S. Ct. at 1270. Anyway, Alternative District 3 *also* uses water contiguity, JA 423, and has the *same number* of VTD splits affecting population as the Enacted Plan, *see* JA 806-07; J.S. App. 79a-81a.

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT

Although irrelevant, the majority's strict scrutiny analysis is also legally erroneous. The majority found that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5," but adopted a narrow tailoring analysis irreconcilable with *Alabama*. J.S. App. 37a.

Narrow tailoring "insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Ala.*, 135 S. Ct. at 1274. Legislatures "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons*

to believe such use is required, even if a court does not find that the actions were necessary." *Id.* (emphasis original).

This deferential standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest" or that a legislature "guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at 1273-74. "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *Id.*

Narrow tailoring thus accords legislatures significant discretion to choose from among a range of VRA-compliant redistricting options. *See id.* Most obviously, a legislature necessarily has a "good reason" to choose the Section 5-compliant plan that *least subordinates* neutral principles, and thus best complies with *Shaw*.

The Legislature clearly had "good reasons to believe" that the Enacted Plan was appropriate to comply with Section 5. *Id.* First, Delegate Janis *correctly* interpreted Section 5 as prohibiting "retrogress[ing] minority voting influence" in District 3. *Compare* J.S. App. 2a, 21a-23a, 55a-61a; JA 124, 350, 356, 362, 364, 368, 369, 449, *with Ala.*, 135 S. Ct. at 1274. Moreover, the year prior to adoption of the Enacted Plan, the Legislature adopted, with strong support from black legislators, a House of Delegates redistricting plan with 55% or higher BVAP in all

majority-black districts, including in geographic areas covered by District 3. JA 515-18. Because black legislators did not want to *harm* black voters, there were very good reasons to believe that this level of BVAP, far from "packing," was proper under Section 5. *See Georgia v. Ashcroft*, 539 U.S. 461, 484, 489-91 (2003) (finding "significant" the views of "representatives . . . protected by the Voting Rights Act").

Moreover, the Enacted Plan with 56.3% BVAP in District 3 performs *better* on the Legislature's incumbency-protection and core-preservation priorities than *any* alternative proposed at the time or in litigation. Indeed, even Plaintiffs' modest 3% BVAP reduction significantly damaged the Legislature's incumbency-protection and core-preservation priorities. JA 520-21, 522, 640-41, 668-70, 693, 697, 889-90; J.S. App. 88a-89a. The Enacted Plan's 3.2% BVAP increase, in contrast, optimally *reduced* conflict between race and neutral principles. *See Ala.*, 135 S. Ct. at 1270-74; *Bush*, 517 U.S. at 977.

Nonetheless, the majority again reasoned that the Enacted Plan was not narrowly tailored because it increased District 3's BVAP. J.S. App. 40a. But the notion that BVAP increases are not "narrowly tailored" because they are not the "least restrictive means" for Section 5 compliance is a legally incorrect test, as *Alabama* confirms, which is why the majority no longer *articulated* this test (but nonetheless continued to *apply* it) on remand. Mem. Op. 43 (DE 109); J.S. App. 39a-40a. *Alabama* obviously did not create a Benchmark BVAP *ceiling* while criticizing such a *floor*, but plainly authorized legislatures to choose a modest BVAP increase where, as here, it

better complies with neutral principles. *See* 135 S. Ct. at 1274. Using the Benchmark BVAP as a ceiling injects *more* race-consciousness by placing states in a racial straitjacket of precisely replicating or reducing BVAP—exactly the type of "trap for an unwary legislature" that *Alabama* forecloses. *Id.* This is particularly obvious here since *augmenting* District 3's BVAP could not have resulted from Delegate Janis's purported desire to avoid *reducing* the 53.1% BVAP, so was necessarily attributable to the incumbency-protection objective it directly furthered.

The majority also found no narrow tailoring because the Legislature did not conduct a costly voting analysis. J.S. App. 42a. But *Alabama* does not require such an analysis. *See* 135 S. Ct. at 1274. And any such analysis to support *reduction* of the BVAP would have been irrelevant here, because such reduction was *foreclosed* by the neutral objectives since it inherently endangered incumbents. This is particularly obvious because any such analysis would have "supported" a dramatic reduction to *less than 30%* BVAP (the non-retrogression percentage resulting from Plaintiffs' voting analysis). JA 702-08. This would have required massive redrawing of many districts' lines and could never be *proven* to be non-retrogressive to the Justice Department. Since any voting analysis was only relevant to supporting a BVAP reduction that both exacerbated the *Shaw* violation by subordinating neutral incumbency protection and at least seriously jeopardized Section 5 preclearance, the Legislature had excellent reasons to eschew this purposeless waste of resources.

VI. APPELLANTS HAVE STANDING TO APPEAL

As Defendants agree, *see* Reply Of Virginia Appellees To Supplemental Briefing On Standing (Oct. 20, 2015), Appellants have standing to appeal because the "judgment" causes them "direct, specific, and concrete injury" by requiring alterations to their districts that place at least one Appellant in a majority-Democratic district and, thus, harm his re-election chances and interests as a Republican voter. *ASARCO*, 490 U.S. at 623-24 (intervenor-defendants had standing to appeal absent State defendants' appeal); *see* Appellants' Br. Re. Standing; Appellants' Reply Br. Re. Standing (Oct. 20, 2015).

1. A party has standing to appeal when it has "a direct stake in the outcome of a litigation." *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). An intervenor-defendant possesses such a direct stake where the "judgment" causes it "direct, specific, and concrete injury," such as by creating "a serious and immediate threat" to its legal interest. *ASARCO*, 490 U.S. at 618, 623-24. The "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006).

Here, there is not merely a "serious and immediate *threat*" to Appellants' districts, but an "actual" change to at least one of them. Indeed, the judgment necessarily requires a remedy that harms at least one Appellant by shifting black (and overwhelmingly Democratic) voters out of District 3 and into one or more of the surrounding Republican districts, and an

equal number of non-black (and far less Democratic) voters into District 3. *All* of these adjacent districts are represented by Appellants. Thus, any remedy will necessarily alter at least one Republican district where an Appellant has previously been elected and voted. *See* Appellants' Br. Re. Standing 7-15; Appellants' Reply Br. Re. Standing 2-10. This is no mere threat, but a *certainty*. *Every* properly-filed proposed remedial plan made at least one Republican district majority-Democratic. *See* Appellants' Br. Re. Standing 9-10; Appellants' Reply Br. Re. Standing 4-5. Several of these plans harm Appellant Forbes by transforming majority-Republican District 4 into a majority-Democratic district, while others harm Appellant Rigell by turning the toss-up District 2 into a majority-Democratic district. *See* Appellants' Br. Re. Standing 9-10; Appellants' Reply Br. Re. Standing 4-5. The special master's proposals completely transform District 4 from a 48% Democratic district into a safe 60% Democratic district. *See* Rep. 45, 52.

Such changes will obviously impose a "direct, specific, and concrete injury" on every affected Appellant. *ASARCO*, 490 U.S. at 623-24. They will "harm" his or her "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474-75 (1987), replace a portion of the "base electorate" with unfavorable Democratic voters, *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 n.3 (7th Cir. 2005), and undo his or her recommendations for the district. These injuries and harms to Appellants' re-election chances are identical to or even more substantial than injuries this Court has upheld as sufficient to confer standing in the electoral context. *See, e.g.*, *Keene*, 481 U.S. at 474

("harm [to] chances for reelection"); *Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974) (candidates have "ample standing" to challenge ballot-access requirements); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (public officeholders had standing to challenge laws requiring automatic resignation upon announcing candidacy for another elective office); *FEC v. Akins*, 524 US. 11, 21 (1998) (deprivation of information regarding group's political activities); *Davis v. FEC*, 554 U.S. 724, 734-35 (2008) ("burden[] [on] expenditure of personal funds" in political campaign); *Swann v. Adams*, 385 U.S. 440, 443 (1967) (intervenors had standing to appeal in redistricting case even though they resided in a county they "concede[d] has received constitutional treatment under the legislative plan" because they sought a remedy providing their county "different treatment"); *see also* Appellants' Br. Re. Standing 11-13; Appellants' Reply Br. Re. Standing 5-8.

Indeed, the "direct, specific, and concrete" harm to Appellants' re-election chances, *ASARCO*, 490 U.S. at 623-24, affects Appellants far more tangibly and directly than lower-court judgments that the Court routinely finds confer standing; *i.e.*, "the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial" that only "contingent[ly]" affects the defendant. *Clinton v. City of New York*, 524 U.S. 417, 430 (1998); *see* Appellants' Br. Re. Standing 11-13; Appellants' Reply Br. Re. Standing 5-8. And it is well-established that actions which threaten one's current occupation or potential employment advancement constitute cognizable injury. *See, e.g.*, *Clements*, 457 U.S. at 962; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764-66 (1976);

Martin v. Wilks, 490 U.S. 755 (1989). There is no reason to exclude members of Congress from this general rule.

2. Plaintiffs contend that Appellants lack standing because they do not allege a violation of "their constitutional or statutory legal rights." Supp. Br. of Appellees 14-15 (Oct. 13, 2015). But unlike plaintiffs, who must establish a violation of a legal *right* to have standing to challenge a *law*, defendants virtually *never* assert a violation of *rights* (except as a counterclaim) when they are sued. Rather, a *defendant* asserts a legally cognizable interest in an appeal where the judgment deprives it of the benefits of the law it is *defending*. *See* Appellants' Reply Br. Re. Standing 3-5. In *ASARCO*, for example, the suit had resulted in "an adjudication" that "pose[d] a serious and immediate threat to the continuing validity" of the intervenor-defendants' leases, which "would [be] remove[d]" if the Court found the challenged judgment "invalid." 490 U.S. at 618.

3. Precedent therefore establishes that Appellants have standing to appeal even though "none reside in or represent the only congressional district whose constitutionality is at issue." 11/13/15 Order; *see* Appellants' Br. Re. Standing 13-14; Appellants' Reply Br. Re. Standing 4-5. Moreover, the Court's decision in *Hays*, 515 U.S. 737, which did not involve any allegation of electoral injury but instead establishes the standing requirements for *Shaw* plaintiffs, *confirms* Appellants' standing to appeal here.

The Court held in *Hays* that "[a]ny citizen able to demonstrate that he or she, personally, has been

injured by [a] racial classification has standing to challenge the classification in federal court." *Id.* at 744. Thus, a plaintiff residing in the allegedly gerrymandered district has "standing to challenge the legislature's action." *Id.* at 745.

The only reason plaintiffs residing in adjacent districts did not automatically have standing to bring a racial discrimination claim is that they did not suffer "a *cognizable* injury *under the Fourteenth Amendment*" because that Amendment only grants a "*personal*" right to "equal treatment" and the voters had not "suffered such [race-based] treatment." *Id.* at 746-47 (emphasis added). Thus, *Hays* merely reaffirms the obvious proposition that those who have not been discriminated against have not suffered a Fourteenth Amendment injury, even if the "racial composition" of their district was affected by discrimination against *others*, just as non-minorities suffer no such injury when employment discrimination against minorities affects the composition of their workforce. *Id.* at 746. Significantly, *Hays* noted that creating the gerrymandered district "[o]f course" "*affects*" the "racial composition" of adjacent districts, but this did not violate the Fourteenth Amendment because any such effect was not motivated by a racial purpose. *Id.* (no evidence "that the [L]egislature intended [adjacent] District 5 to have any particular racial composition"). Here, in contrast, the negative effect on Appellants' re-election chances and electoral interests, even though not racially motivated, provides standing because it produces the requisite "direct stake in the outcome" of the appeal. Appellants' Br. Re. Standing 7-15.

Moreover, just as a plaintiff's constitutional rights are injured by residing in a racially gerrymandered district, so too are Appellants' cognizable interests injured by the majority's decision that works a "serious and immediate threat" to one or more of their districts and their electoral interests. *ASARCO*, 490 U.S. at 618. In both instances, the litigant is seeking relief against a legally improper action that will directly affect his district (an unconstitutional districting plan or an erroneous "remedial" alteration of a constitutional districting plan).

More to the point, an incumbent in an adjacent district is alleging injury no different than an incumbent residing in (and defending) the allegedly gerrymandered district, who concededly would have standing to appeal an adverse judgment. An adverse judgment imposes an identical harm on representatives residing adjacent to the gerrymandered district as it does on the incumbent in the district. Because congressional redistricting plans must achieve equal population across all districts, any remedial alteration of the population of the gerrymandered district will be precisely *equal* to the (cumulative) population alteration of the adjacent districts. For example, the special master's proposed plans move 321,782 or 336,752 people, respectively, into District 3 and the same number out of District 3. *See* Rep. 22, 25. Accordingly, just as District 3's incumbent would concededly have standing to appeal such threatened changes to his district, incumbents in neighboring districts have standing to appeal the corresponding changes to their districts.

Finally, Appellants *have* adduced "specific evidence" of personal harm—*i.e.*, their electoral harm—that *Hays* required of adjacent-district residents. 515 U.S. at 744-45.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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